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IN THE

Supreme Court of the United States

October Term 1964

No. 428

ALBERT LAPIN and LAPINAL, INC.,

Petitioners,

vs.

SHULTON, INC., and TECNIQUE, INC.,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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ALBERT LAPIN and LAPINAL, INC.,

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vs.

SHULTON, INC., and TECNIQUE, INC.,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Lapinal, Inc., a corporation, and Albert Lapin, individually and as an officer of said corporation, pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on May 27, 1964.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported but is reproduced in Appendix A, pp. 1-8. The Order of the United States District Court for the Southern District of California, Central Division, granting Defendants' Motion to Dismiss, entered December 4, 1962, is not reported but is reproduced in Appendix B.

The Memorandum and Order of the United States District Court for the Southern District of California,

Central Division, entered April 29, 1963, clarifying and amending its Order of December 4, 1962, is not reported but is reproduced in Appendix C.

Jurisdiction.

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 27, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented.

1. Does the United States District Court for the Southern District of California have jurisdiction to entertain an independent action brought by plaintiffs in 1962 seeking relief from an injunction issued in 1951 by the United States District Court for the District of Minnesota where the relief sought is predicated on Rule 60(b), Federal Rules of Civil Procedure, in that it is no longer equitable that the judgment should have prospective application and where, in 1962, the principal defendant, Shulton, Inc. (who was not a party to the original action nor an assignee of record of one of the parties to the original action), did not do business nor could it be found in the territorial jurisdiction of the issuing court?

2. Does Rule 60(b) merely preserve to the Courts the powers which theretofore they had been free to exercise under writs of *coram nobis*, *coram vobis*, *audita querela*, bills of review and bills in the nature of bills of review, or otherwise, or does Rule 60(b), as its

language so plainly indicates, abolish the substance and procedure of the old ancillary writs and substitute therefor a motion, as prescribed in the rules or an independent action as alternative procedures for obtaining any relief from a judgment?

3. Do considerations of comity and orderly administration of justice demand that, in an independent action brought under Rule 60(b)(5), the non-rendering Court should decline jurisdiction of such an action and remand the parties for their relief to the rendering Court where at the time of the commencement of the independent action (approximately eleven years after the original injunction was issued) the principal defendant, Shulton, Inc. (who was neither a party to the original action nor an assignee of record of one of the parties to the original action), did not do business nor could it be found in the territorial jurisdiction of the issuing court?

4. In an action brought under Rule 60(b)(5), was the District Court correct in granting defendants' motion to dismiss, made after both defendants had appeared in the action and had filed a joint answer, on the ground that defendant Tecnique, Inc., was an indispensable party not properly served where defendant had answered only 40 out of 124 interrogatories served by plaintiffs; where plaintiffs were denied any discovery on the issues raised by the motion to dismiss, which issues were substantive issues in the case as well as jurisdictional issues and where there was no plenary trial of such issues?

Statute Involved.

There is no specific statutes involved. This case involves the interpretation of Rule 60(b) and particularly Rule 60(b)(5) of the Federal Rules of Civil Procedure, and is reproduced in Appendix D.

Statement of the Case.

On or about November 22, 1947, Albert Lapin, Isadore Lapin, Samuel Lapin and Harold Lapin, predecessors and organizers of plaintiff Lapinal, Inc., entered into a written license agreement with La Maur Products, Inc., a Minnesota corporation, under the terms of which the Lapins granted La Maur an exclusive license to manufacture and sell a hair dye made in accordance with a "secret" formula and "secret" process and La Maur Products, Inc., agreed to make an initial cash payment and to pay royalties. After difficulties arose between the parties, the Lapins commenced an action (Civil Action, File No. 3232) on January 30, 1950, in the United States District Court for the District of Minnesota, Fourth Division, for an injunction and damages and La Maur, Inc., as defendant in that action, filed an answer and a counterclaim seeking an injunction against manufacture of the said hair dye by the Lapins and certain damages.

On or about September 18, 1950, the said action was brought to trial before Judge Nordbye and resulted in the granting of an injunction on December 30, 1950, in favor of La Maur, Inc., the essence of which is as follows:

> "Now, therefore, pursuant thereto, you, Albert Lapin, Isadore Lapin, Samuel Lapin and Harold Lapin, and each of you, your agents, servants, em-

ployees and attorneys, and all persons in active concert or participation with you, including Lapinol, Inc., a California corporation, and its successors or assigns, hereby are jointly and severally commanded forthwith to cease and desist from, and are enjoined and prohibited from directly or indirectly further manufacturing, producing, compounding, making, preparing, selling, delivering, disposing of, or distributing 'Lapinol' hair-dye or any other hair-dye made by or in accordance with or covered by the formula and or formulas and process which is the subject matter of the License Agreement of November 22, 1947, between Albert Lapin, Isadore Lapin, Samuel Lapin and Harold Lapin as parties of the first part, and La Maur, Inc., as party of the second part, or any improvement therein or thereof, including the use of any ingredient added by defendant, La Maur, Inc., on or about and since February 13, 1948; and from, directly or indirectly, licensing, causing, consenting to, or assisting or cooperating in, the same by any person, party, firm or corporation other than said defendant; and are further enjoined and prohibited from, directly or indirectly, disclosing or causing to be disclosed, said formula and or formulas or process or any improvement therein to any person, party, firm or corporation other than said defendant, so long as the said License Agreement remains in force and effect." [R. p. 3, line 25, to p. 4, line 20.]

Subsequently, on or about July 5, 1951, Judge Nordbye, pursuant to a stipulation of the parties, entered an amendment and modification of Findings of Fact,

Conclusions of Law and Order and Decree granting an amended writ of injunction as follows:

"Now, therefore, pursuant thereto you, Albert Lapin, Isadore Lapin, Samuel Lapin and Harold Lapin, and each of you, and your agents, servants, employees and attorneys, and all persons in active concert or participation with you or them, including Lapinol, Inc., a California corporation, also known as LapinAl, and its successors and assigns, hereby are, jointly and severally, enjoined and prohibited from selling, transfering, assigning, divulging or disposing in any manner whatsoever, directly or indirectly, to any other person, firm or corporation, including any and all persons other than you Albert Lapin, Isadore Lapin, Samuel Lapin and Harold Lapin yourselves, who now or hereafter are or may become interested in said LAPINOL, INC. or its successors or assigns, whether as investors, money-lenders, agents, employees or otherwise, the formula or formulas or process for the manufacture of 'LAPINOL' hair dye, also known as 'LapinAL', or any other hair dye, or hair coloring or hair tinting products or process now known to or hereafter devised by you or any of you, made by or in accordance with or covered by the formulas and process which are the subject matter of the License Agreement of November 22, 1947 between you as parties of the first part and La Maur, Inc. as party of the second part (of which Exhibit 'A' attached to the Complaint in this case is a copy), or any improvements therein or thereof, or any interest or right in any of the foregoing; and are further, jointly and severally, en-

joined and prohibited from licensing, authorizing, causing, consenting to, assisting or suffering, directly or indirectly, any person, firm or corporation, to manufacture, produce, compound or sell, or distribute 'LAPINOL' hair dye, also known as 'LapinAL', or any other hair dye or hair coloring or hair tinting products or process now known to or hereafter devised by you or any of you, made by or in accordance with or covered by the formulas and process which are the subject matter of said License Agreement, or any improvements therein; and are further, jointly and severally, enjoined and prohibited from divulging or disclosing or causing to be divulged or disclosed, directly or indirectly, to any person, firm or corporation whatsoever the secret formula or process for the manufacture of 'Tecnique', or any changes or improvements therein made or to be made by defendant La Maur, Inc., but are jointly and severally commanded and enjoined to keep the same forever in strict confidence and secrecy.' Provided, however, that the foregoing restraint, prohibition and command shall not be construed to prevent you, Albert Lapin, individually or through the instrumentality of said LAPINOL, INC. from manufacturing 'LAPINOL' or 'LapinAL', or any other hair dye or hair coloring or hair tinting product other than 'TECNIQUE', or from selling the same in the usual course of the beauty trade for so long, but only so long, as you, Albert Lapin, Isadore Lapin, Samuel Lapin and Harold Lapin, and each of you, and your agents, servants, employees and attorneys, and all persons in active concert or participation

with you or them and said LAPINOL, INC. shall refrain from violating the foregoing injunctions, prohibitions and commands, and for so long, but only so long, as said LAPINOL, INC. shall remain a corporation with the majority of each class of shares of stock or other securities issued by it owned and held by you, Albert Lapin, to your own account, free and clear of any encumbrances, restrictions and agreements, and you, Albert Lapin, continue as its principal officer; and on the additional condition that you, Albert Lapin, and/or said LAPINOL, INC., shall not adopt or use the name 'TECNIQUE' or any name resembling or similar to the word 'TECNIQUE', or resembling or similar to any other name or mark used by defendant LA MAUR, INC." [R. p. 4, line 26, to p. 6, line 29].

La Maur, Inc., thereafter manufactured and sold a hair coloring substance under the trade name "Tecnique" through the instrumentality of a Minnesota corporation named Tecnique, Inc., until August, 1959, when all of the stock of Tecnique, Inc., of Minnesota, was sold to Shulton, Inc. [R. p. 165, lines 11-17; pp. 243, 244.] Concurrently, Shulton organized a New Jersey corporation which also bore the name Tecnique, Inc. Five months later, in December, 1959, Tecnique, Inc., of Minnesota, then wholly owned by Shulton, transferred to Tecnique, Inc., of New Jersey, also wholly owned by Shulton, its interest in the basic formula by a bill of sale [R. p. 192] and its interest, if any, in the decree of injunction by an assignement. [R. p. 198.] Both Tecnique, Inc., of New Jersey, and Shulton, Inc., have thereafter engaged in the manu-

facture and distribution of a hair coloring substance called Tecnique. Since 1951, petitioner Lapinal, Inc., has manufactured and distributed a hair coloring substance called "Lapinal."

In July, 1962, Petitioners brought this action in the United States District Court for the Southern District of California, Central Division, under Rule 60(b)(5), Federal Rules of Civil Procedure, alleging that changed conditions arising since the issuance of the injunction of 1951 have made the prospective application of the injunction inequitable and oppressive to Petitioners and of no legitimate value to the defendant Shulton, Inc., and Tecnique, Inc. Both Shulton, Inc., and Tecnique, Inc., were served by serving the General Manager of Shulton, Inc., in Los Angeles.

The joint Answer (filed August 20, 1962) of defendants Shulton, Inc., and Tecnique, Inc., so far as relevant here, challenged the Court's jurisdiction to hear the case on the ground that the case could be heard only by the United States District Court in Minnesota [Answer, para. 2, R. p. 8] and on the further ground that Tecnique, Inc., of New Jersey, was an indispensable party which had not been properly served. The defendants thereafter (on November 14, 1962) made a motion to dismiss which was granted on December 4, 1962, by the District Court [R. pp. 225-227]. In its opinion the District Court held only that Tecnique, Inc., of New Jersey, was an indispensable party which had not been properly served but it did express an opinion, without so holding, that the relief sought by petitioners should only be sought by motion in the District Court where the original decree was issued. Thereupon petitioners moved, under Rule 59, (1) for a rehearing on

defendants' motion to dismiss; (2) to open the judgment to take additional evidence; (3) for a plenary trial upon the jurisdictional issues raised by the defendant's motion to dismiss and (4) to alter or amend the judgment thereafter entered. [R. p. 234.] On April 29, 1963, the District Court amended its order of December 4, 1962, to read that "defendants' motion to dismiss the complaint is granted without prejudice to the bringing of another action *when and if* it appears that the court can obtain jurisdiction of the defendant Tecnique, Inc." (App. C, p. 17). The District Court also stated that "If such a time should arrive, that would be time enough to decide whether an action such as the present one is properly maintainable in some court other than the one which rendered the decree of injunction." (App. C. p. 17.) Thereafter an appeal was taken to the Court of Appeals for the Ninth Circuit.

The United States Court of Appeals for the Ninth Circuit did not "reach" the issues upon which the District Court predicated its decision. (App. A. p. 2.) It merely decided that the action should have been brought in the issuing Court; the District Court of Minnesota, upon the following line of reasoning:

> (1) Rule 60(b) preserves to the courts the powers which theretofore they had been free to exercise under writs of *coram nobis, coram vobis audita querela* and bills of review and bills in the nature of bills of review or otherwise but does not grant new power and authority not theretofore recognized. (App. A. p. 4.)
>
> (2) Under the pre-existing powers thus preserved to the courts, there was no authority to

entertain an original action such as the one before the Court. (App. A, p. 4.)

(3) Considerations of comity and orderly administration of justice demand that the non-rendering Court should decline jurisdiction of such an action and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there. (App. A, p. 7.)

Reasons for Granting the Writ.

There are four principal reasons why this Court should grant a Writ of Certiorari.

1. The petition brings before the Court an important question of Federal procedure which has not been, but should be, settled by this Court. The United States Court of Appeals for the Ninth Circuit has, in its decision, adopted reasoning which, ignoring the plain language and expressed intention of the Advisory Committee, has rigorously restricted the humane purpose of Rule 60(b) and has infused into the clear language of the rule the subtleties and confusion of the old common law writs and equitable remedies. Since every action, whether legal or equitable in nature, brought in any Federal Court is potentially affected by Rule 60(b), there are firm considerations of public interest in an unequivocal judicial declaration of the intent, purpose and effect of Rule 60(b).

The decision of the United States Court of Appeals for the Ninth Circuit was predicated upon its conclusion that Rule 60(b) preserved to courts the powers which theretofore they had been free to exercise under certain specified common law writs but did not grant any new power or authority not theretofore recognized.

Then, in support of its conclusion that it found no authority for an original action such as the one in this case, it proceeded to discuss and analyze writs of *audita querela* and bills of review. Such reasoning is diametrically opposed to that of the Advisory Committee's Report, dated June 14, 1946, to the Honorable Justices of this Court.

In its transmittal letter to the Court, the Committee stated that "The time has arrived when the Court should consider amendments which experience may have shown to be desirable," and that "The purpose and effect of the amendments are stated in the notes."[1] Turning to the section of the Report which deals with Rule 60, we find that the amendments suggested by the Advisory Committee were adopted in *haec verba* except as to the reference to one statute.

The note of the Advisory Committee to Rule 60(b) is particularly enlightening. After discussing various decisions to the effect that the old common law remedies to obtain relief from a judgment were still available, the Committee stated that the rules should be complete and should define the practice with respect to any existing rights or remedies to obtain relief from final judgments. Then follows a clear statement of the purpose of the reconstruction of Rule 60(b).

> "The reconstruction of Rule 60(b) has for one of its purposes a clarification of this situation. Two types of procedure to obtain relief from judgments are specified in the rules as it is proposed to amend them. One procedure is by motion in

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[1]Report of the Advisory Committee, 5 F.R.D. 433, 434.

the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment. Various rules, such as the one dealing with a motion for new trial and for amendment of judgments, Rule 59, one for amended findings, Rule 52, and one for judgment notwithstanding the verdict, Rule 50(b), and including the provisions of Rule 60(b) as amended, prescribe the various types of cases in which the practice by motion is permitted. In each case there is a limit upon the time within which resort to a motion is permitted, and this time limit may not be enlarged under Rule 6(b). If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations. The Committee has endeavored to ascertain all the remedies and types of relief heretofore available by *coram nobis*, *coram vobis*, *audita querela*, bill of review, or bill in the nature of a bill of review. See Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L. J. 623, 659-682. It endeavored then to amend the rules to permit, either by motion or by independent action, the granting of various kinds of relief from judgments which were permitted

in the federal courts prior to the adoption of these rules, and the amendment concludes with a provision abolishing the use of bills of review and the other common law writs referred to, and requiring the practice to be by motion or by independent action."[2]

There can therefore be no doubt that it was the intention of the Advisory Committee in drafting Rule 60(b) that an independent action, such as the original action in this case, was preserved whether or not begun in the court which rendered the judgment. The Court of Appeals for the Ninth Circuit ignores not only the plain language of the Rule but also the statement of purpose of the draftsmen of the Rule and presumably the purpose and intent of the Court which promulgated the Rule. For that reason, we respectfully suggest that the decision incorrectly interprets the Rule and should be reversed.

2. There is a clear conflict between the decision of the Court of Appeals for the Ninth Circuit in this case and the decision of the Court of Appeals for the Second Circuit in *Hadden v. Rumsey Products*, 196 F. 2d 92 (2d Cir., 1952) reversing the decision of the District Court reported in 96 F. Supp. 988 (S. D. N. Y. 1951) and remanding the case for further proceedings.

In the Hadden case, the defendants executed cognovit notes payable to the corporation of which the plaintiff was the disinterested trustee. The notes contained a provision that any attorney could confess judgment in the event of a default and that the right of appeal

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[2]Report of the Advisory Committee, 5 F.R.D. 433, 478.

was waived. Plaintiff's attorneys, pursuant to the provision, filed an answer on behalf of the defendant consenting to the entry of the judgment requested in the plaintiff's petition, filed by the same attorneys in the Ohio District Court. Thereafter, plaintiff forwarded an exemplified copy of the confessed judgment for registration in the New York District Court and the defendant, upon learning of this action, immediately filed a petition for an order to show cause pursuant to which the New York District Court on the return date, "(1) granted a preliminary injunction against causing execution to be issued on the judgment; (2) restrained the Clerk of the New York Court from entering the transcript of the Ohio judgment; and (3) ordered that the matter remain open for further orders."[3] Subsequently, the defendants filed a second petition alleging the defenses to the notes and in which they sought an order to set aside the Ohio judgment. After a second hearing, the New York Court rendered a judgment which permanently enjoined the judgment creditor from attempting to enforce the Ohio judgment and permanently restrained the Clerk of the New York Court from entering the transcript of the said judgment in his office.

The plaintiff raised two questions on appeal:

(1) Whether the New York Court had acquired personal jurisdiction of the judgment creditor; and

(2) Whether the judgment by confession was obtained by a fraud on the Ohio court.

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[3] *Hadden v. Rumsey Products, supra*, at page 95.

The Court of Appeals for the Second Circuit held that by seeking affirmative relief from the New York District Court, the plaintiff had waived any question of personal jurisdiction. It further decided that the several petitions filed by the defendants could be treated as an independent action and that Rule 60(b) did not "limit the power of a court to entertain an independent action to relieve a party from a judgment" (*Ibid*, p. 95). The Court of Appeals reversed the judgment on the ground that there had been no fraud on the Ohio court and remanded the matter to the New York Court for a trial on the defendants' allegations of duress, fraudulent misrepresentation and concealment.

The decision of the Ninth Circuit also conflicts with the decision of the Fourth Circuit in *Sayers v. Burkhardt*, 85 Fed. 246, 248 (4th Cir., 1898) and of the decision of this Court in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944) in which this Court stated at pages 244 and 248:

> "From the beginning there has existed * * * a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments * * *. Marine Insurance Co. v. Hodgson, 7 Cranch 332, 3 L.Ed. 362; Marshall v. Holmes, 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870. * * * Out of deference to the deep rooted policy in favor of the response of judgments * * *, courts of equity have been cautious in exercising their power over such judgments. United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93. *But where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable,' Pickford v. Talbott,*

225 U.S. 651, 657, 32 S.Ct. 687, 689, 56 L.Ed. 1240, they have wielded the power without hesitation. Litigants who have sought to invoke this equity power customarily have done so * * * by original proceedings to enjoin enforcement of a judgment. *And in cases where courts have exercised the power the relief granted has taken several forms: setting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining the beneficiaries of the judgment from taking any benefit whatever from it. But whatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required the court has, in some manner, devitalized the judgment. * * *"* (Emphasis added.)

3. With regard to the specific case before this Court, the petitioners have been denied, as a purely procedural matter and without a trial on the merits, an opportunity to seek relief under Rule 60(b)(5) from an injunction in the only United States District Court where all of the interested parties can be found.

The Court of Appeals was in error in its determination, by inference at least, that the remand to the rendering court was proper "so long as it is apparent that a remedy is available there". (App. A. p. 7) Even if this principle were sound as a general pronouncement, it certainly is not sound as applied to the facts of this case. As we have seen (*supra*, p. 8), Shulton, Inc., the principal defendant acquired all of the stock of Tecnique, Inc., of Minnesota, on the same day [R. p. 165, lines 11-17] as it organized Tecnique,

Inc., of New Jersey. [August 19, 1959, R. p. 164, lines 11-13.]

On December 17, 1959, La Maur, Inc., executed a Bill of Sale to Tecnique, Inc., of Minnesota, and an assignment of its right, title and interest in the judgment and decree to Tecnique of Minnesota, and on December 18, 1959, with documents substantially identical in context, Tecnique, of Minnesota, executed a bill of sale and assignment to Tecnique, Inc., of New Jersey. At the time of the execution of these documents in December, 1959, Shulton, Inc., not only owned all of the shares of stock of Tecnique of Minnesota, the assignor, but also owned all of the stock of Tecnique, of New Jersey, the assignee. Shulton was and is, in our view, the principal defendant and the two Tecnique corporations were and are mere instrumentalities.

If Petitioners were to be relegated to the District Court of Minnesota, they would face the problem of obtaining jurisdiction over Shulton and Tecnique of New Jersey. It is possible that an argument could be made that ancillary jurisdiction over Tecnique of New Jersey, although not found in the district, could be obtained (on the authority of *Butler v. Ungerleider*, 187 F. 2d 238 (2d Cir., 1951) on the theory that it is the assignee, once removed, of the rights of La Maur, Inc. (La Maur, Inc., to Tecnique, Inc., of Minnesota, to Tecnique, Inc., of New Jersey). It is, however, at least doubtful whether or not such a theory of ancillary jurisdiction could be sustained. Moreover, Shulton, Inc., the principal defendant, could not be found in the District of Minnesota and since Shulton does not appear either in the original action or as an assignee, however remote, there is no basis for obtaining jurisdiction

in Minnesota in an independent action or in any proceeding ancillary to the original action. It therefore appears that in Minnesota, the possibility of obtaining personal jurisdiction of Tecnique, Inc., of New Jersey, is doubtful and there is no possibility at all of obtaining personal jurisdiction of the defendant Shuiton, Inc.

The Writ of Audita Querela was utilized at common law to give relief only from common law judgments (Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 638). Since we are seeking relief from an injunction issued by the District Court of Minnesota, the writ of audita querela or any theory of relief predicated upon such a writ, would not be available in a proceeding in equity as a matter of substantive law. Similarly, the remedy formerly available by a bill of review or a bill in the nature of a bill of review was predicated upon the existence of the following grounds, none of which is present in the instant case:

(a) Error of law apparent on the face of the record without further examination of matters of fact;

(b) Because of new facts discovered since the decree which would materially affect the decree and probably induce a different result.

(c) Fraud in procuring the decree. (Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 639.)

Petitioners sought relief only from the prospective application of the injunction on the ground that changed conditions since the issuance of the decree made such prospective application inequitable. The Court of Ap-

peals found no authority for such an action under pre-existing powers preserved to the Courts by its construction of Rule 60(b). Yet Professor Moore, in his analytical article of 1946, included an elaborate discussion of the independent action (Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 653-654):

> "The nature of the independent action is such that a court of equity may restrain not only the enforcement of equitable decrees but also judgments at law; and the decree or judgment need not have been rendered by the court whose equitable jurisdiction is invoked. Thus a federal court, in a proper case, could enjoin the enforcement not only of a federal judgment, but of a judgment or decree of a state tribunal. This latter principle has been carried to the point of sustaining jurisdiction to relieve against a divorce decree although the federal courts have no original jurisdiction over divorce proceedings." [Citing *McNeil v. McNeil*, 78 F. 834 (C.C.N.D. Cal. 1897).]
>
> "Formerly it was well settled that 28 U.S.C. §379, generally forbidding the use of a federal injunction 'to stay proceedings in any court of a state,' did not prevent federal courts 'from depriving a party by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement would be contrary to recognized principles of equity in the standards of good conscience.'" [Citing *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 183 (1920); *Marshall v. Holmes*, 141 U.S. 589 (1891); *Simon v. Southern Railway*, 236 U.S. 115 (1915); *Atchi-*

son, Topeka & Santa Fe Ry. v. Wells, 265 U.S. 101 (1924)]

"A reasonable view was that by entertaining such actions a court is not interfering with the processes of another court and barring the latter's judgment, but is merely acting upon the holder of the judgment who is within its jurisdiction; the bill to impeach or enjoin does not operate to review, undo or reverse the decree or judgment but merely seeks to deny the other party of the fruits thereof."

4. The District Court granted the motion of the defendants to dismiss, made after both defendants had appeared in the action and had filed a joint answer, on the ground that the defendant Tecnique, Inc., was an indispensable party who had not been properly served. The District Court, in order to arrive at this result, was required to decide:

(a) That Tecnique, Inc., of New Jersey, was a corporate entity which had rights, independent of the defendant Shulton (who was admittedly before the court) of such substance that the trial court could not proceed without Tecnique, Inc. of New Jersey;

(b) That Tecnique, Inc., which was organized by Shulton on the very day (August 19, 1959) when Shulton agreed to purchase from La Maur the shares of Tecnique, Inc., of Minnesota, acquired certain rights to a formula for hair dye and to an injunction by a series of assignments and bills of sale executed four months after Shulton acquired the stock of Tecnique, Inc. of Minnesota;

(c) That the right to the formula for hair dye and to the injunction were assignable and that the instruments of conveyance were bona fide instruments supported by a valid consideration rather than formal acts by two servants of the same master without genuine substance or significance.

(d) That in spite of the obvious interrelationship, Tecnique was a separate entity and not the *alter ego* of Shulton, Inc.;

(e) That Shulton was not the agent of Tecnique through which Tecnique (if it has any substance at all) does business within the district where the appellees asserted that there was an oral agreement between the two;

(f) That Tecnique was not doing business directly within the district.

It will readily be seen that these subparagraphs describe issues which involve questions of substantive law which should be resolved only after a plenary trial. In recognition of this fact, petitioners, after the original District Court opinion had been rendered, made a motion pursuant to Rule 59, Federal Rules of Civil Procedure, as follows:

(1) For a rehearing on the defendant's motion to dismiss;

(2) To open the judgment and to take additional evidence under Rule 59 (a) (2);

(3) For a plenary trial upon the jurisdictional issues raised by defendant's motion to dismiss;

(4) To alter or amend the judgment heretofore entered [R. p. 234].

This motion was denied by the District Court and further discovery was foreclosed even though the following evidence was placed before the Court:

> "1. Tecnique (New Jersey) was organized by the appellee Shulton on August 19, 1959 (defendants' answer to (plaintiffs') interrogatory 20, (R. p. 164, lines 11-13) for the purpose of acquiring and continuing the business of Tecnique (Minnesota) (Bangs' affidavit, R. p. 266, lines 12 to 14). This was the same day on which stock purchase agreements for the sale of the stock of Tecnique (Minnesota) were executed (defendants' answer to plaintiffs' interrogatory 28, R. p. 165, lines 11-17).
>
> 2. The Bill of Sale from La Maur, Inc. to Tecnique (Minnesota) [R. p. 192-193] and the assignment of the judgment and decree from La Maur, Inc., to Tecnique (Minnesota) were dated December 17, 1959, eight years after the injunction had issued and four months after La Maur, Inc. had sold its shares in Tecnique (Minnesota) to Shulton.
>
> 3. The Bill of Sale from Tecnique (Minnesota) to Tecnique (New Jersey) [R. p. 194-195 was executed by Richard M. Parks and Nicholas J. Livoti. Parks was not only a Vice President and Director of Shulton (defendants' answer to plaintiffs' interrogatories 16 and 17, R. p. 163, lines 8-9 and 29) but also a Vice President of Tecnique (Minnesota) (R. p. 195) and a Vice President of Tecnique (New Jersey) (R. p. 162, lines 20-25). Nicholas J. Livoti was not only an Assistant Secretary of Shulton (R. p. 163, lines 21-22) but

was also Secretary of Tecnique (Minnesota) (R. p. 195) and Secretary of Tecnique (New Jersey) (R. p. 162, line 24). These gentlemen simultaneously represented both parties to this transaction and the sole shareholder of both the assignor and the assignee.

4. At the time of the execution of the said Bills of Sale and Assignment in December, 1959, the defendant Shulton not only owned all of the shares of stock of Tecnique (Minnesota), the assignor, but also owned all of the shares of stock of Tecnique (New Jersey), the assignee. The individuals who acted for the assignor, Technique (Minnesota) and for the assignee Tecnique (New Jersey) were both corporate officers of Shulton and one was also a member of the Board of Directors of Shulton.

5. In addition to the documents themselves, the transaction by which La Maur, Inc. sold its shares in Technique (Minnesota) was described once by La Maur and once by Shulton in the public records of the Securities & Exchange Commission (see letter dated August 24, 1962, from Raymond J. Sullivan, Chief, Public Reference and Correspondence Section, Securities & Exchange Commission, R. p. 242).

(a) In the Spring of 1962, La Maur, Inc., through Paine, Weber, Jackson & Curtis, Stockbrokers, undertook a substantial public offering of its shares and filed a Registration Statement with the Securities & Exchange Commission. This filing occurred more than two years after the stock sale to Shulton but, in accordance with the require-

ment of the Commission, the transaction was described at length as follows:

"In 1959 the Company sold to Shulton, Inc., a cosmetics manufacturer, its preferred stock in a corporation known as Tecnique, Inc., a distributor of permanent hair coloring products, a hair lightener and a hand cream. The Company received $50,000 on the sale of its stock and, as its cost basis therein was $2,730 the Company realized a long-term capital gain, after expenses in connection with the sale, of $45,487. Shulton, Inc., also acquired at the time it purchased the Company's preferred stock in Tecnique, Inc., all of the common stock thereof.

"The Common Stock of Tecnique, Inc. was owned as follows: Maurice L. Spiegel—70%, Walter C. Smith—15%, Sigmund B. Pass, an unaffiliated person—15%.

"The Company did all of the manufacturing of Tecnique's products under an arrangement whereby the Company was paid its costs plus 10% plus a percentage of certain other operating costs. The percentages of the Company's sales to Tecnique to the Company's total sales in the calendar years 1957, 1958 and 1959 were as follows:

Year	Percentage of Company's Sale to Tecnique to Company's Total Sales
1957	5.85
1958	5.12
1959	4.59

"In connection with the sale of the Tecnique stock, the Company gave to Shulton, Inc. a covenant not to compete, under which the Company agreed, in essence: that it would not for a period of 25 years manufacture, sell, distribute or license any products under the label of 'Tecnique' nor for such 25-year period would it use the word 'Tecnique' alone or in conjunction with other words'; and that, for a period of 5 years, it would not manufacture, sell, distribute or license any permanent hair coloring, as distinguished from a temporary hair coloring; and that, for a period of 5 years, it would not manufacture, sell, distribute or license any products for the retail trade competitive with any product marketed by Tecnique for the retail trade at the time of the above sale of that company's preferred stock. As indicated by the above, the products that were then marketed by Tecnique to the retail trade were permanent hair coloring products, a hair lightener and a hand cream." [R. pp. 243 and 244.]

This is a clear and unequivocal statement by La Maur, the seller of the shares of Tecnique (Minnesota) that the buyer of the shares was Shulton; that a restrictive covenant was given by La Maur to Shulton and there is no mention whatever of Tecnique (New Jersey).

(b) The Form 10K (Annual Report) filed by Shulton, Inc., for the year 1959, in accordance with Section 15(d) of the Securities & Exchange Act of 1934 and Rule X-15D-1 of the General Rules and Regulations under the Securities Act of

1934, within 120 days after the close of the year, was also before the trial court. [R. p. 245.] In this form, prepared and filed before this litigation was commenced, Shulton stated that it acquired all of the capital stock of Tecnique (Minnesota); that it (Shulton) dissolved Tecnique (Minnesota) and the assets were subsequently conveyed to and its liabilities were subsequently assumed by Tecnique (New Jersey).

These statements, made independently by La Maur, the seller, and Shulton, the buyer, before this litigation was commenced and in official reports to a regulatory agency of the United States Government, directly refute the sworn statements of Mr. Livoti to the effect that Tecnique (New Jersey) acquired all of the stock of Tecnique (Minnesota) [R. p. 164, lines 14-17] and that Shulton did not acquire all of the stock of Tecnique (Minnesota). [R. pp. 18-21.] It also refutes the affidavit of Mr. Bangs, House Counsel for Shulton, in which he states that Tecnique (New Jersey) purchased the shares of Tecnique (Minnesota) [R. p. 266, lines 12-18] although Mr. Bangs may perhaps be excused since he is discussing a transaction which occurred (August, 1959) before he became employed by Shulton (September, 1959).

Further support plaintiffs' claim that Shulton was the real party in interest and the actual purchaser of the shares of Tecnique (Minnesota) comes from Mr. Melvin Siegel of the Minneapolis firm of Leonard, Street and Deinard who was admitted specially to argue the motion to dismiss before the District Court. After counsel for the plaintiffs had presented to the Court the records of the Securities & Exchange Commission

contradicting not only the answer [R. p. 18, line 32, to p. 19, line 3] but also the affidavit of Mr. Bangs [R. p. 266, lines 12-18] and defendants' answer to plaintiffs' interrogatories 21 and 22 [R. p. 164, lines 14-21]. Mr. Siegel confirmed the plaintiffs' contentions in the following language:

> "I do want to comment as to the statements that were made, though they were not called to my attention by way of service of affidavit, but I am familiar with the facts. And since he has seen fit to call your Honor's attention to documents which have not even been called to your Honor's attention, let me state what I think appears in the answers to the interrogatories as to how the sale took place.
>
> "Shulton purchased from La Maur all of the stock which La Maur held in Tecnique of Minnesota. And it also purchased from Tecnique of Minnesota all of Tecnique of Minnesota's stock.
>
> "Consequently, Tecnique of Minnesota then and there became a 100 per cent owned subsidiary of Shulton, just as Tecnique of New Jersey now is.
>
> "So it is true that La Maur did sell its stock interest in Tecnique of Minnesota to Shulton, and Tecnique of Minnesota sold its stock interest to Shulton." [Rep. Tr. p. 64, line 16, to p. 65, line 7.]

In the light of the sworn statement by the seller, La Maur, that it sold the shares of Tecnique (Minnesota) to Shulton and the statement by Shulton, the buyer, that it purchased the shares of Tecnique (Minnesota) and the tatement of Mr. Siegel, it is extremely

difficult for us to see how the District Court could have found in Tecnique (New Jersey) an interest in the subject matter of this litigation of such substance as to render it an indispensable party where Shulton was already a defendant and admittedly before this Court.

6. Tecnique (New Jersey) has no manufacturing facilities separate from Shulton, Inc. [defendants' answer to plaintiffs' interrogatory 11, R. p. 161, lines 26-29].

7. Tecnique (New Jersey) has no warehouse or storage facilities separate from Shulton, Inc. [defendants' answer to plaintiffs' interrogatory 12, R. p. 161, lines 30-32 and p. 162, line 1].

8. Tecnique (New Jersey) occupies the same business premises as Shulton, Inc. in Passaic, New Jersey [defendants' answer to plaintiffs' interrogatory 6, R. p. 161, lines 1-4].

9. The following are officers and directors common to Shulton, Inc., Tecnique (New Jersey) and, in part, Tecnique (Minnesota):

(a) Richard N. Parks is Vice President of Tecnique (New Jersey) [defendants' answer to plaintiffs' interrogatory 14, R. p. 162, line 23]; Vice President of Shulton, Inc. [defendants' answer to plaintiffs' interrogatory 16, R. p. 163, lines 8-9]; a member of the Board of Directors of Shulton, Inc. [defendants' answer to plaintiffs' interrogatory 17, R. p. 163, line 29]; and was a Vice President of Tecnique, Inc., Minnesota as of December 18, 1959 [see Bill of Sale December 18, 1959, from Tecnique, Inc. Minnesota to Tecnique, Inc. New Jersey, Exhibit C to affidavit of Ni-

cholas J. Livoti in support of defendants' motion to dismiss, R. p. 195].

(b) Nicholas J. Livoti is Secretary of Tecnique, Inc., New Jersey [defendants' answer to plaintiffs' interrogatory 14, R. p. 162, line 24]; Assistant Secretary of Shulton, Inc. [defendants' answer to plaintiffs' interrogatory 16, R. p. 163, lines 21-22]; and was Secretary of Tecnique, Inc., Minnesota, as of December 18, 1959 [see Bill of Sale December 18, 1959, from Tecnique, Inc., Minnesota, to Tecnique, Inc., New Jersey, Exhibit C to affidavit of Nicholas J. Livoti in support of defendants' motion of dismiss, R. p. 195].

(c) William H. O'Brien is Treasurer of Tecnique, Inc., New Jersey [defendants' answer to plaintiffs' interrogatory 14, R. p. 162, line 25]; a member of the Board of Directors of Tecnique, Inc., New Jersey [defendants' answer to plaintiffs' interrogatory 15, R. p. 162, line 30]; Vice President of Shulton, Inc. [defendants' answer to plaintiffs' interrogatory 16, R. p. 163, lines 12-13]; and a member of the Board of Directors of Shulton, Inc. [R. p. 163, line 32].

(d) George L. Schultz is a member of the Board of Directors of Tecnique Inc., New Jersey [defendants' answer to plaintiffs' interrogatory 15, R. p. 162, line 28]; President of Shulton, Inc. [defendants' answer to plaintiffs' interrogatory 16, R. p. 163, lines 3-4]; and a member of the Board of Directors of Shulton, Inc. [R. p. 163, line 27].

All of the officers and directors of Tecnique (New Jersey), with the single exception of Sig Pass, are officers and or directors of Shulton, Inc.

10. Tecnique (New Jersey) carries on business correspondence on stationery of Shulton, Inc. [R. p. 246].

11. Shulton, Inc., dealt as the principal in connection with the very subject matter of this litigation [see letter dated July 31, 1961, on Shulton, Inc., letterhead signed by Goerge L. Schultz, President, R. p. 247; see letter dated June 26, 1962, on Shulton, Inc., letterhead signed by John K. Bangs, House Counsel, R. p. 248].

12. Shulton, Inc., advertises and sells "Tecnique by Shulton" not only to the retail trade [see Exhibit G, R. p. 249, and Exhibit H, R. p. 250], but also to the *professional trade*. Mr. Livoti was wrong when he answered plaintiffs' interrogatory 13 in which he tried to establish that Shulton, Inc., sold only to the retail trade, while Tecnique, New Jersey, sold only to the professional trade. That Shulton, Inc., sells directly to the professional trade is shown by the following exhibits:

(a) Exhibit I—Advertising brochure by "Shulton-Tecnique Division" which clearly shows a "*professional package*" [R. p. 251];

(b) Exhibit J—Double page advertisement for "Tecnique *Professional* Color-Tone by Shulton" [R. pp. 252 and 253];

(c) Exhibit K—Advertisement by "Shulton-Tecnique Division" for *professional trade* [R. p. 254];

(d) Exhibit L—Advertisement by "Shulton Tecnique Division" for *professional trade* [R. p. 255].

Exhibits I, J, K and L were obtained by plaintiffs' counsel in the course of preparation for this action in 1962.

13. There is evidence in the record that Breiseth and Williams of Shulton, Inc., make sales calls for "Tecnique" on Mercury Beauty Supply of Los Angeles and that "Tecnique" is ordered by that company by telephoning "SP 6-1888" which is the telephone number listed on page 1267 of the Los Angeles Central Telephone Directory for "Shulton, Inc. 5431 West 104th St." [R. unnumbered page between pp. 240 and 241, lines 27-32, p. 241, lines 1-4].

14. Tecnique, Inc., New Jersey, and Tecnique, Inc., Minnesota, were wholly-owned subsidiaries of Shulton, Inc., in December 1959, and Tecnique, Inc., New Jersey, has remained a wholly-owned subsidiary of Shulton, Inc., as of the date of this action [paragraph I of joint answer of Shulton, Inc., and Tecnique, Inc., New Jersey, admitting allegation to the effect in paragraph I of the complaint herein, R. p. 8, lines 23-27].

It therefore appears that plaintiffs, in spite of the refusal of the District Court to allow pre-trial discovery after the motion to dismiss was filed, have nevertheless established by a fair preponderance of the credible evidence that Tecnique (New Jersey) is simply an instrumentality which has no rights of substance apart from those of Shulton, Inc; that Shulton, Inc., is the real party in interest and is properly before the Court and that Tecnique (New Jersey) is neither a necessary nor an indispensable party to this action.

We believe that the District Court was in error on two grounds: First, in denying petitioners a plenary trial since the jurisdictional issues were substantially the same as substantive issues to be decided in the case and, Second, in refusing to allow petitioners a reason-

able opportunity to complete their discovery on the issues raised by the motion to dismiss.

We recognize that where a jurisdictional issue to be determined in a non-jury case is clearly separate from the issues as to the merits of the controversy, a district court may try the jurisdictional issue summarily upon motion and by affidavit; see *Land v. Dollar*, 330 U. S. 731, 735 (1947). However, where a jurisdictional issue coincides in whole or in substantial part with an issue going to the merits, it has been held that considerations of policy underlying the due process concept require that a determination of such issues be made only after a plenary trial, even in non-jury cases. See:

Magenau v. Aetna Freight Lines, 360 U. S. 273, 278 (1959);

Byrd v. Blue Ridge Rural Electric Cooperative, 356 U. S. 525, 533-540 (1958);

Smithers v. Smith, 204 U. S. 632, 642-646 (1907);

Marks Food Corp. v. Barbara Ann Baking Co., 274 F. 2d 934, 936 (9th Cir., 1959);

Fireman's Fund Ins. Co. v. Railway Express Agency, 253 F. 2d 780, 783-785 (6th Cir., 1958);

Taylor v. Hubbell, 188 F. 2d 106, 108-109 (9th Cir., 1951), Cert. denied, 342 U. S. 818 (1951);

Shaffer v. Coty, Inc., 183 F. Supp. 662, 667 (S.D. Cal. 1960);

Williams v. Minnesota Mining & Manufacturing Co., 14 F.R.D. 1, 7-9 (S.D. Cal. 1953).

The foregoing conclusion to the effect that the District Court erred in refusing Petitioners a plenary trial presupposes that in connection with such trial, the Petitioners would have been afforded normal pre-trial discovery. However, even where the District Court may summarily dispose of the jurisdictional issues, it is nevertheless incumbent upon the Court to allow the parties a reasonable opportunity to complete discovery where the defendants have, by affidavit, raised issues as to facts which bear on the jurisdiction of the Court. See:

River Plate Corp. v. Forestal Land, Timber & Railway Co., Ltd., 185 F. Supp. 832 (S.D. N.Y. 1960);

General Ind. Co. v. Birmingham Sound Reproducers, Ltd., 26 F.R.D. 559 (E.D. N.Y., 1961);

Ziegler Chemical & Mineral Corp. v. Standard Oil of Calif., 32 F.R.D. 241 (N.D. Cal. 1962).

Conclusion.

The decision of the Ninth Circuit Court of Appeals, in effect, frustrates the expressed intention of the Advisory Committee in recommending amendments to Rule 60(b) and presumably, the intention of this Court in adopting the amendments. It creates a retrogression to the complexity and uncertainty of the old common law writs in spite of the obvious efforts since 1938 to up date federal procedure. It denies the petitioners an opportunity to be heard in the only district in which all parties can be found.

We would hope we will find in this Court a response similar to that of the Court of Appeals for the Sec-

ond Circuit in *Markert v. Saifi & Co., Inc.*, 173 F. 2d 517, 518 (2d Cir., 1949):

> "Though the case has been shunted back and forth between trial and appellate courts, it has not yet progressed beyond an exercise in pleading niceties. Modern impatience with procedural formalities suggests the probable unproductiveness of such a course, which we must now underscore by our holding that plaintiffs cannot properly be denied opportunity to present the case they believe they have."

We believe the judgment of the United States Circuit Court of Appeals for the Ninth Circuit should be reversed and to that end the writ herein prayed for should issue.

Respectfully submitted.

FRANCIS GEORGE STAPLETON
Attorney for Petitioners.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Albert Lapin and Lapinal, Inc., Appellants, vs. Shulton, Inc., and Tecnique, Inc., Appellees. No. 18,775.

May 27, 1964

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Jertberg, Merrill and Browning, Circuit Judges.

Merrill, Circuit Judge:

This appeal is taken from judgment entered on motion of appellees, dismissing the action for lack of jurisdiction.

Appellant brought suit in Los Angeles in the District Court for the Southern District of California, Central Division, under Rule 60 (b) F.R.C.P.[1] to dissolve an injunction issued July 5, 1951 by the United States District Court of Minnesota upon the ground that changed circumstances had rendered inequitable the prospective application of the decree.[2] The injunction so issued

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[1]In pertinent part this rule provides:

"On motion, and upon such terms as are just, the court may relieve a party * * * from a final judgment, order, or proceeding for the following reasons: * * * (5) * * * it is no longer equitable that the judgment should have prospective application * * *."

[2]The complaint asserts:

"The changed conditions arising since the issuance of the injunction in 1951 have made the prospective appli-

ran in favor of LaMaur, Inc., which since has transferred its rights thereunder to appellee Tecnique, Inc., a wholly owned subsidiary of appellee Shulton, Inc.

Tecnique, appearing specially, and Shulton moved to dismiss the action upon two grounds: (1) that although Shulton had been properly served with process, Tecnique had not been properly served and was an indispensable party; (2) that in any event jurisdiction to dissolve the injunction lay exclusively with the Minnesota District Court.

The order of the district court below, granting dismissal, was based upon the first ground. The court, although not deciding the question, also expressed an opinion that on the second ground as well it was without jurisdiction.

We do not reach the issues presented by the first ground. We decide only that the present proceedings to secure dissolution of an injunction on the grounds here asserted should have been brought in the issuing court, the District Court of Minnesota, and that the trial court was thus correct in refusing to entertain the action.

It is clear that the issuing court has continuing jurisdiction to modify or revoke an injunction as changed circumstances may dictate.

In *U.S. v. Swift & Compa...* (1932) 286 U.S. 106, 114-115, the court stated:

> "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to

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cation of the injunction inequitable and oppressive to plaintiffs and of no legitimate benefit to defendants." The complaint prays judgment dissolving the injunction.

changed conditions though it was entered by consent * * *. Power to modify the decree was preserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need * * *. [A] court does not abdicate the power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."

In *System Federation No. 91, Railway Employes' Dep't v. Wright* (1961) 364 U.S. 642, 647, the court said:

"There is * * * no dispute but that a sound judicial discretion may call for the modification of the terms of an injunction decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief."

As to the authority of courts other than the one rendering judgment or decree, Rule 60(b) provides:

"This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant

relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

As we construe this provision, it preserves to courts the powers which theretofore they had been free to exercise under the specified writs or otherwise, but does not purport to grant new power and authority not theretofore recognized. See Notes of Advisory Committee to Rule 60(b); 3 Barron & Holtzoff, Federal Practice and Procedure (1958), §1331; 7 Moore, Federal Practice (1955), ¶¶60.36-60.37. Under the pre-existing powers thus preserved to the courts we find no authority to entertain an original action such as the one before us.

The writ of audita querela provides relief from a judgment at law because of events occurring subsequently which should cause discharge of a judgment debtor. See 3 Barron & Holtzoff, supra, §1331 at page 429. While, formally, this is an independent action, the rule appears to be that the writ may be brought only in the court which rendered the judgment. *Eureka Casualty Company v. Municipal Court of Los Angeles* (1934) 136 Cal.App. 195, 28 P.2d 708; see Moore & Rogers, Federal Relief from Civil Judgments (1946) 55 Yale Law Journal 623, 661.

The equitable counterpart of audita querela by which relief from equitable decrees may be secured is the bill

of review. One recognized ground for such relief is that changed circumstances render enforcement inequitable. See Moore & Rogers, *supra*, at pages 675-681; 10 Nichols Cyclopedia of Federal Practice (3d. Ed. 1952) §37.26, at page 335.

Nichols, *supra*, states that bills of review in general "were filed in the court in which the decree was rendered." Courts also have recognized that a bill of review, although not actually a part of the original suit, is deemed to be a continuation of that action and ancillary to it. *Pacific Railroad of Missouri v. Missouri Pacific Railroad Company* (1884), 11 U.S. 505, 522; *Zegura v. U.S.* (5 Cir. 1939), 104 F.2d 34, 35, cert. denied (1939) 308 U.S. 586; see also *Hartford-Empire Company v. Hazel-Atlas Glass Company* (3 Cir. 1941) 125 F.2d 976.

In *Deposit Bank v. Frankfort* (1903) 191 U.S. 499, it was held that relief from an injunction clearly warranted by a change in governing law must be secured from the issuing court. There the Federal Circuit Court for the District of Kentucky had perpetually enjoined the city from collecting a certain tax from the bank. It had based its judgment and decree squarely upon the decision of a lower state court to the effect that a previous state law which had exempted the bank from such a tax constituted a binding contract between the state and the bank, with the result that even after its repeal the bank was exempt from the tax. The injunctive decree was affirmed by the United States Supreme Court. The Court of Appeals of Kentucky then reversed the lower state court's decision on which the injunction-issuing Federal court had relied, holding that the previous law was not a contract and that the bank

was no longer exempt from the tax. After a remand, and on subsequent appeal, the Kentucky Court of Appeals held that because of the now-settled erroneousness of the decision on which the Federal Circuit Court relied, its decree was not a binding estoppel on the parties in a state court action by the city to collect the tax. On appeal from this decision the United States Supreme Court reversed, stating at page 512:

> "It is to be remembered that we are not dealing with the right of the parties to get relief from the original judgment by bill of review or other process in the Federal court in which it was rendered. There the court may reconsider and set aside or modify its judgment upon seasonable application. In every other forum the reasons for passing the decree are wholly immaterial and the subsequent reversal of the judgment upon which it is predicated can have no other effect than to authorize the party aggrieved to move in some proper proceeding, in the court of its rendition, to modify it or set it aside. It cannot be attacked collaterally, and in every other court must be given full force and effect, irrespective of the reasons upon which it is based."

In our judgment sound reasons of policy support the proposition that relief should be sought from the issuing court.

It is true that if a court other than the issuing court were to grant relief such relief could technically operate only upon the parties and not on the decree itself. See 7 Moore, *supra*, ¶60.36, at pages 603-604. Nevertheless, for a nonissuing court to entertain an action for such relief would be seriously to interfere with, and

substantially, to usurp, the inherent power of the issuing court (as discussed in *Deposit Bank v. Frankfort* and *System Federation v. Wright*, supra), to supervise its continuing decree by determining from time to time whether and how the decree should be supplemented, modified or discontinued in order properly to adapt it to new or changing circumstances.

We need not go so far as to hold that these considerations and this interpretation of Rule 60(b) deprive all courts other than the issuing court of jurisdiction in such a case as this. We do hold that considerations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction of such an action and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there.

In this respect we approve the decision and language of the District Court for the Southern District of New York in *Torquay Corporation v. Radio Corporation of America* (S.D.N.Y. 1932) 2 Fed.Supp. 841.

There the United States, in the Federal District Court of Delaware, had obtained a consent decree requiring General Electric and Westinghouse to divest their stock in R.C.A. in certain ways and within specified times, enjoining continued existence of various license agreements, specifying in detail various acts which might and might not be done and retaining jurisdiction for the purpose of enforcing or modifying the decree. The plaintiff corporation brought an action in the Southern District of New York as an R.C.A. stockholder, complaining that General Electric, Westinghouse and R.C.A. had deceived the District Court of Delaware as a result of which R.C.A. was losing rights and was being

deprived of fair and adequate consideration for the stock with which it had parted, to the unjust enrichment of General Electric and Westinghouse. The prayer for relief was that General Electric and Westinghouse be required to retransfer to R.C.A. their stock in that company; that a receiver be appointed to take possession of the stock and that it be declared the absolute property of R.C.A.

The District Court declined relief, stating, at page 844:

> "Assuming for the moment that this court has jurisdiction of the present suit, it is clear, as a matter of comity and of the orderly administration of justice, that this court should refuse to exercise its jurisdiction to interfere with the operation of a decree of another federal court. Especially is this so where it is clear that the United States District Court in Delaware would have jurisdiction of such a suit as is now before this court. A bill to modify or restrain the enforcement of a decree of a federal court may undoubtedly be brought in the court which entered such decree. * * * [C]omplainant's rights, if any, would seem to be more properly justiciable in the court that made the decree, out of which complainant's grievance arises, than here."

Affirmed.

APPENDIX B.

Order Granting Defendants' Motion to Dismiss.

In the United States District Court, Southern District of California, Central Division.

Albert Lapin and Lapinal, Inc., Plaintiffs, vs. Shulton, Inc. and Tecnique, Inc., Defendants. No. 62-913 MC.

Defendants' motion to dismiss was heard November 20, 1962, Melvin H. Siegel, Esq., and William S. Scully, Jr., Esq., appearing for defendants, and F. G. Stapleton, Esq., appearing for plaintiffs.

Plaintiff has filed suit in this court under Rule 60 (b) of the Federal Rules of Civil Procedure to dissolve an injunction granted by the United States District Court of Minnesota, Fourth Division, and served Norton M. Breiseth, Regional Manager of defendant, Shulton, Inc., in Los Angeles, California. Mr. Breiseth, by affidavit, states he is not connected in any way with the other defendant, Tecnique, Inc., which is a New Jersey corporation that is not licensed to do business in California and does not have solicitors, employees, salesmen or other representatives in California.

From defendants' answer to plaintiffs' interrogatories and the affidavit of Nicholas J. Livoti, who is both secretary of Tecnique, Inc. and assistant secretary of Shulton, Inc., it appears that defendants are separate and distinct corporations, although Tecnique, Inc., of New Jersey, is a wholly owned subsidiary of defendant Shulton Inc.

It further appears that Tecnique, Inc. is the owner of the decree of injunction sought to be dissolved by this action and is therefore an indispensable party.

Plaintiff contends that defendants are one and the same, that Tecnique of New Jersey has no substance, is the alter ego of defendant Shulton, Inc., and that the corporate entity should be disregarded.

It appears to the court that the corporate separation is real and not mere fiction and should not be ignored to determine jurisdiction.

While the above is determinative of the within matter, the court feels it should address itself briefly to the other major contention of defendant that any relief obtained by means of the motion provided by Rule 60(b) of the Federal Rules of Civil Procedure must be obtained in the United States District Court of Minnesota, where the original Decree of Injunction was issued. This is true as far as it goes, but it is also true that Rule 60(b) contemplates two types of procedure to obtain relief from a final judgment. 7 Moore's Federal Practice (2nd Ed.) Section 60.28 [1], p. 312. In addition to proceeding by motion, it is stated at page 312 that a party may proceed by a new or independent action, "which may or may not be instituted in the district court which rendered the judgment."

This language seems to indicate that an independent action could be brought on any of the grounds listed under Rule 60(b), including 60(b)(5), to the effect that "it is no longer equitable that the judgment should have prospective application." However, the discussion of the substantive bases for an independent action at 7 Moore's p. 600, et seq., indicates that such independent actions lie for fraud, accident or mistake, where the judgment is void, where, in light of newly discovered evidence, it would be unconscionable to give effect to a judgment.

There appears to be no case wherein a decree injunction rendered by a federal district court in one district has been dissolved by a court of another district on the ground that the prospective application of the injunction is no longer equitable, and, while it is not necessary at this time to decide the issue, this court is of the opinion that the relief sought by plaintiff should only be sought by motion in the district court where the original decree was issued.

This court having found that there was no proper service upon Tecnique, Inc., an indispensable party.

It Is Ordered that defendants' motion to dismiss the complaint is hereby granted.

Dated: November 30, 1962.

M. D. Crocker
United States District Judge

APPENDIX C.

Memorandum and Order.

In the United States District Court, Southern District of California, Central Division.

Albert Lapin and Lapinal, Inc., Plaintiffs, vs. Shulton, Inc. and Tecnique, Inc., Defendants. No. 62-913 MC.

This cause came before the court for hearing on plaintiff's Motion to Amend and Modify Judgment, pursuant to Rule 59, Federal Rules of Civil Procedure; F. G. Stapleton of Stapleton, Weinberg and Isen, appearing for plaintiff; and William S. Scully of Hill, Farrer & Burrill, appearing for defendant; plaintiff asking specifically the following of the court:

1. A rehearing under Rule 59 of the Federal Rules of Civil Procedure of the defendants' motion to dismiss the complaint;

2. To open the judgment and to take additional evidence by deposition or affidavit under Rule 59 (a)(2);

3. For a plenary trial upon the jurisdictional issue raised by the defendants' motion to dismiss;

4. To alter or amend the judgment heretofore entered in this action under Rule 59.

Upon oral argument, plaintiff emphasized his request that the judgment be opened for the purpose of allowing the affidavit of F. G. Stapleton, with attached exhibits, to be made part of the record, but he also urged that a plenary trial should be held on the jurisdictional issue involved, and that in the present circumstances the judgment should be modified to read "without prejudice."

Defendants for their part, in connection with their brief in opposition to the present motion, have filed two additional affidavits and request that in the event the affidavit of F. G. Stapleton is made a part of the record these also be made a part thereof.

After oral argument the cause was submitted to the court for decision.

Plaintiff makes what he terms a "technical" argument that there was no evidence in opposition to the motion to dismiss before the court when it reached its decision, and for this reason he now urges that the affidavit he has submitted be considered by the court.

I have studied the affidavit of F. G. Stapleton and find that it offers no compelling reasons for reaching a different conclusion from that reached by this court in its order entered on December 4, 1962.

It is, at best, an understatement to say that the argument of no evidence before the court is a "technical" one.

The affidavit contains essentially the same information which was argued before the court and submitted in plaintiff's Points and Authorities filed November 21, 1962.

For the purpose of review, however, I feel that the affidavit should enter as part of the record.

Plaintiff next urges that it was error for the court not to provide for a plenary trial on the jurisdictional issue involved, and he cites as authority *Shaffer v. Coty, Inc.*, 183 F. Supp. 692, 699. I quote the following pertinent passage from the opinion of Judge Mathes:

> "Where the jurisdictional issue to be determined in a non-jury case stands apart from the issues as

to the merits of the controversy, as for example a challenge as to citizenship in a diversity case, it is appropriate to try that issue summarily, upon motion, and by receiving and weighing affidavits. [Citations omitted.]

"On the other hand, where a jurisdictional issue coincides in whole or substantial part with an issue going to the merits, as for example a challenge as to the amount of damage in controversy, considerations of policy underlying the due-process concept are said to require that determination be made only after plenary trial, even in non-jury cases." [Citations omitted.]

Admittedly, in a given case, depending on the circumstances, the issue with which we are presently concerned—indispensability of a party not served with process—could either stand apart from *or* coincide with the issues going to the merits. Suffice it to say that in the present situation I feel that it is sufficiently separable to be triable upon motion and affidavits.

The complaint herein seeks the dissolution of an injunction on the ground of its inequitable, prospective application, due to changed conditions. While the complaint does not specify the changed conditions which are relied upon by plaintiff, upon oral argument on the motion to dismiss, counsel did make reference thereto as follows: "The product has changed in ten years." [Tr. 68] "Two, the market has changed in ten years." [Tr. 68] "Third, the competitive strength of the parties. Since we are only talking about money really, the competitive strength of the parties is the key to this thing. If there is any danger that Lapinal with its

$110,000 is a serious threat to Shulton with its $25,000,000. I do not see it." [Tr. 69] It appears then that the changed conditions, as stated by counsel, "relate to a change in the competitive attitude of these two people, Lapinal and Shulton." [Tr. 70]

The jurisdictional issues decided by this court were entirely separable and had only an unsubstantial, if any, effect on the merits of the cause. The evidence shows that through assignments, Tecnique, Inc., of New Jersey, became the owner of the Minnesota decree of injunction. Whether it is, in legal effect, the owner of such decree would have to be determined at a proceeding, to which, it is elementary, Tecnique, Inc. of New Jersey, would be an indispensable party.

For purposes of clarification, it should be understood that this court, in its Order of December 4, 1962, made no finding that Tecnique of New Jersey is, in legal effect, the owner of the decree of injunction which forms the subject of this action. The purport of that Order is that because of its *apparent* ownership Tecnique, of New Jersey, is an indispensable party to any action which seeks to extinguish such injunction and, consequently, the rights therein.

Plaintiff, as a matter of fact, does not seem to dispute that, on paper at least, Tecnique of New Jersey owns the injunction. What plaintiff does emphatically contend is that Shulton is the real party in interest, that Tecnique is only a sham and should be disregarded.

However, even where, as here, the subsidiary is wholly owned by the parent and there are common directors and other features which will enable a court to disregard the corporate existence of the subsidiary, there

should be affirmative reasons for so doing. Here there are no considerations of fraud or other like inequities which would call for treating the two entities as one. What plaintiff's contentions amount to, in effect, is that it would be inequitable to not disregard the corporate existence of Tecnique because if it is not disregarded, under the present circumstances, an action to dissolve the injunction will not be maintainable in this jurisdiction.

Being of the opinion that the present action is properly maintainable only in the District Court where the decree of injunction was rendered [see this court's Order of December 4, 1962, in the present case], I cannot feel that failure to treat Tecnique as a sham at this time leads to an inequitable result.

This, of course, is not a decision on the merits. It does not even preclude the piercing of the same veil in a situation where justice would require it to be pierced. Failure to disregard Tecnique as a separate entity, moreover, does not alter the fact that it is wholly owned by Shulton. This could, and undoubtedly would, be taken to account in a hearing on the merits when considering the 'change in the competitive attitude of these two people, Lapinal and Shulton."

This does not mean that the corporate separation, no matter how formal, should be brushed aside merely because plaintiff would rather bring his action here than elsewhere.

The plaintiff also asks that the judgment of dismissal be modified to read "without prejudice." I feel that this request should be granted. We should not presume to guess that Tecnique will never be found in

California, and plaintiff should not be precluded from bringing another action when, and if, Tecnique should become amenable to the process and jurisdiction of this court. The judgment should be clarified in this respect.

If such a time should arrive, that would be time enough to decide whether an action such as the present one is properly maintainable in some court other than the one which rendered the decree of injunction.

It Is Ordered that the Affidavit of F. G. Stapleton of December 12, 1962, the Affidavits of Norton M. Breiseth and John K. Bangs of December 14, 1962 are hereby made a part of the record of this case;

It Is Further Ordered that the Order of December 4, 1962, in the instant action is hereby amended to read that defendants' motion to dismiss the complaint is granted without prejudice to the bringing of another action when and if it appears that the court can obtain jurisdiction of the defendant Tecnique, Inc.;

It Is Further Ordered that all other requests of plaintiff are hereby denied.

Dated: April 26, 1963.

M. D. Crocker
United States District Judge

APPENDIX D.

Rule 60.

Relief From Judgment or Order.

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as

provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946; Dec. 29, 1948, eff. Oct. 20, 1949.